# CERTIFICATION FROM UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN

MARI DANIEL, individually and as the personal representative of the Estate of Melvin Daniel and as Guardian for the minor children, and as the personal representative of the Estate of Fred Ramiskey,

Plaintiff-Appellant,

v.

THE COLEMAN COMPANY, INC.,

Defendant-Appellee.

No. 08-35592 United States Court of Appeals for the Ninth Circuit

No. 3:06-cv-05706-KLS United States District Court for the Western District of Washington, Tacoma

Supreme Court No. 848 9-8

DEFENDANT-APPELLEE,
THE COLEMAN COMPANY
INC.'S ANSWERING BRIEF
ON THE CERTIFIED
QUESTION

SUPRENE NOURT
STATE ON ACCOMMOTOR

TO SEP 27 PM 3: 11

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#### I. QUESTION CERTIFIED AND PROPOSED ANSWER

Whether, under Wash. Rev. Code § 7.72.030(1)(c), where a manufacturer has warned at the time of manufacture of a danger posed by a product, the manufacturer may have an additional duty to warn after the time of manufacture if the same danger already warned of is greater than was known at the time of manufacture and the initial warnings have not eliminated the danger.

Order Certifying A Question to the Washington Supreme Court at 2 (9th Cir. Dkt 46-1)

The answer to the certified question is "no." The question answers itself in the negative by its very factual premise. The question expressly presupposes that the danger was already known before manufacture, and that the existing, on-product warnings have already covered the danger. Under these facts, claimants in Washington may address their grievances under the Washington Product Liability Act's ("WPLA") time-of-manufacture warnings claim embodied in RCW 7.72.030(1)(b), but may not seek to remedy the very same grievances under the post-manufacture duty to warn claim contained in RCW 7.72.030(1)(c). This is because the WPLA draws a sharp distinction between a time-of-manufacture warnings claim and a post-manufacture warnings claim. The claims are mutually exclusive, and address different alleged wrongs that arise at different times. The plain language of Section 1(b) provides a warnings claim for dangers existing "at the time of manufacture" under a robust strict liability

standard. The plain language of Section 1(c), by contrast, provides that a negligence-based post-manufacture duty to warn is triggered only in those unique circumstances where a manufacturer learns of a danger connected with its product *after* manufacture. Nothing in the statute's language, structure, or legislative history suggests that the Legislature intended to create yet a third species of warnings claim, as Daniel suggests the Court do here. Indeed, to answer "yes" to the question is tantamount to a major revision to Section 1(c), a task committed to the Legislature, not the courts. Prior decisions of this Court and the Court of Appeals are in accord, and have consistently interpreted Section 1(c) to cover only subsequently discovered dangers.

Expanding the post-manufacture duty to warn also is unnecessary, and would only lead to absurd and unpredictable instances of near absolute liability, which runs counter to prior teachings of this Court. It is, therefore, not surprising that Daniel cannot cite a single authority that, upon examination, supports her position. Indeed, courts and commentators across the country embrace the distinction between time-of-manufacture and post-manufacture warnings claims already present in existing Washington law.

No matter how this Court answers the certified question, however, it will not change the outcome of this case. Daniel failed to introduce any

evidence from which a jury could conclude (1) that post-manufacture warnings would have reached Robert Haney (the heater's second-hand owner) or the decedents; or (2) that Haney or the decedents would have read and heeded additional warnings. Evidence on these two points would be completely speculative, especially when neither Haney nor the decedents read the warnings that were available to them on the heater itself, warnings the jury found to be adequate.

For all of the above reasons, the Court should answer "no" to the certified question.

#### II. STATEMENT OF THE CASE

The Court should view Daniel's brief with a skeptical eye. It is not tailored to the certified question and it ignores the current procedural posture of this case. In essence, Daniel took her Ninth Circuit brief, changed the caption, inserted a misquoted version of the certified question, and filed it with this Court – as though this Court had appellate power over the entire trial proceeding. Daniel's brief ignores that the jury found the product in this case, a Coleman Powermate Model 5045 propane radiant heater, reasonably safe in design and with respect to its time-of-manufacture warnings. Daniel's brief also ignores the fact that the Ninth Circuit affirmed the District Court's evidentiary rulings in every respect, including the discretionary ruling to exclude other incident documents rife

with unredeemed hearsay and concerning incidents and products dissimilar to the present case. To address all of the errors or twice-rejected arguments in Daniel's brief would be extremely time-consuming and ultimately beside the point, given that this Court's mandate is to answer the certified question based on its express factual premise that the danger was already known and warned against at the time of manufacture. Therefore, Coleman will not venture down every rabbit hole, but instead will focus on the legal question before the Court.

#### A. The Accident.

In mid-September 2006, Robert Haney and two members of his extended family, Fred Ramiskey and Melvin Daniel, went on a hunting trip in the Chambers Lake area near Packwood, Washington, staying in Daniel's twenty-five foot camper. RT-98, 105, 107, 112, 243. After a long day of hunting, a freezing rain set in and Daniel, Ramiskey and Haney arrived back at their campsite around 8:30 p.m. RT-110. Upon their arrival, the camper's batteries were dead. RT-111. Daniel and Ramiskey hooked the camper's batteries to Daniel's diesel truck to recharge as Haney prepared chili on the camper's propane-fueled stove. RT-111, 112.

<sup>&</sup>lt;sup>1</sup> Throughout this brief, "ER" refers to the Excerpts of Record Daniel filed in the Ninth Circuit; "SER" refers to the Supplemental Excerpts of Record Coleman filed in the Ninth Circuit; and "RT" refers to the trial transcript.

Before he started preparing the evening meal, Haney retrieved his Coleman Powermate 5045 propane radiant heater ("the subject heater") from his truck and brought it inside the camper (with Daniel's and Ramiskey's approval) to "knock the chill off." RT-112, 151-53; see SER-692, 694, 702, 710. Haney, a U.S. Army Warrant Officer with fifteen years of service, RT-94, 133, received the heater from a friend while the two were stationed in Korea. RT-101-02. The subject heater contained the following on-product warning, among others:

Follow Instructions and Warnings to avoid fires, serious injury, or death



#### Warning

For outdoor or well ventilated construction use only.
 Never use inside house, camper, tent, vehicle or other unventilated or enclosed area.

SER-769-70.

In addition to the on-product warning, the Powermate 5045 was sold with Instructions for Use, which also provide a warning prohibiting its use in campers or other enclosed areas. SER-765-68; RT-1236-40. They also direct users to open the propane tank fully. SER-767; RT-1229, 1230. The Instructions for Use also tell users to re-light the heater if it burns a blue flame and does not glow red hot. SER-767; RT-1230.

On the night of the accident, the subject heater was attached to a

full, 30-pound propane tank, RT-130, which also contained a warning prohibiting indoor use:

# OUTDOOR USE ONLY.\* •DO NOT USE OR STORE CYLINDER IN A BUILDING, GARAGE OR ENCLOSED AREA. SER-928.

None of the three men read the warnings provided. RT-135, 141-42, 155-56. Daniel, in fact, was unable to read. RT-871. Haney knew, however, that the subject heater had an on-product warning. RT-141-42. He had read the word "warning" on the label but did not read the warning's contents, skipping them while reading the lighting instructions positioned directly below. *Id.*; *see also* RT-135; SER-769.

Haney acknowledged that he already knew—before the accident—that the subject heater produces carbon monoxide ("CO"). RT-149, 157. From his military training in Korea, Haney had learned that any fuelburning heating device—not just the subject heater—produces CO. RT-104, 149. He also received CO training prior to the accident when he was certified as an EMT while stationed in Hawaii. RT-149. Nevertheless, Haney used the subject heater many times in enclosed spaces, including in his garage and in tents. *Id*.

Despite his knowledge of CO and the warning label prohibiting use inside a camper, Haney operated the large, 45,000 Btu heater inside

Daniel's camper. RT-104, 115, 134, 149, 157, 1142-43. He opened a window in the kitchen area approximately four inches and initially ran the heater on its "high" setting. RT-115, 134, 157.

When dinner was ready, Haney turned the heater down to the lowest setting on the heater's control knob, and he and Daniel ate their meal and talked about the next day's hunt as Ramiskey prepared for bed. RT-112-13, 114, 135. After dinner, Daniel went to bed around 10:00 p.m., and Haney turned the heater off and then went to the camp bathroom. RT-114, 118. When Haney returned from the bathroom, he shut the window down to about one-half inch and left it open that amount for the rest of the night. RT-114. Before turning in, Haney also had a conversation with both Daniel and Ramiskey, and none of the men were exhibiting signs of CO poisoning at that time. RT-113, 135.

In all, Haney ran the heater for approximately one hour that evening—about a half an hour on "high" and about a half an hour on the lowest heat setting on the heater's control knob. RT-133-34; *see* SER-694. While the heater operated, the valve on the propane tank was fully open. RT-140-41. When Haney adjusted the heater from its high setting to its lowest heat setting, he did so by adjusting the heater's control knob, not by reducing the fuel flow by manipulating the propane tank valve. RT-141.

Haney awoke early to Ramiskey's alarm clock feeling ill. RT-123-24. He started the heater and soon discovered both Ramiskey and Daniel cold and unresponsive. RT-124-25. Suspecting CO poisoning, Haney turned off the heater, got dressed and drove to Packwood for assistance. RT-126-27.

Daniel and Ramiskey died of CO poisoning. SER-1370.

According to Daniel's expert toxicologist, Dr. Penney, the decedents had to have been exposed to at least 1,000 parts per million ("ppm") CO for several hours to achieve the carboxyhemoglobin levels they exhibited.

RT-246-47.

Local sheriff detectives tested the heater on videotape and found no defects or leaks, and they verified that it turned off properly, *i.e.*, that it was actually off when its control knob was in the "off" position. RT-208-09. The officers also weighed the heater and propane tank, and the weight coincided with the time and usage level that Haney described. RT-210, 684, 1511-14.

Daniel's recitation of the accident scenario generally comports with Coleman's. One assertion Daniel makes throughout her brief, however, requires special attention. Daniel asserts that Haney—the owner and only operator of the Coleman Powermate 5045 heater—operated the heater at a reduced fuel flow by partially closing the valve on the propane

tank.<sup>2</sup> Daniel makes this assertion in an effort to suggest that this mode of operation is a new hazard about which Coleman was not aware at the time of manufacture. Brief of Appellant on Certified Question ("Daniel Br.") at 2, 5, 6, 9, 27, 32, 33. This representation is directly contrary to Haney's testimony that he operated the heater for less than an hour with the propane tank valve fully open prior to the accident. RT-133-34; 140-141. There was no reduced fuel flow operation. *Id*.

Daniel's continued false assertions on this point, however, are of no moment here because both the District Court and the Ninth Circuit, concluded that the increased CO levels generated by a reduced fuel flow was a danger Coleman learned before manufacture of the subject heater, not after. This is clear by the question certified to this Court, which provides that "where a manufacturer has warned at the time of manufacture of a danger posed by a product, the manufacturer may have an additional duty to warn after the time of manufacture if the same danger already warned of is greater than was known at the time of

<sup>&</sup>lt;sup>2</sup> After testing the subject heater inside Daniel's camper and discovering the heater did not generate lethal levels of CO as Haney described having operated it, Daniel's counsel advised her experts to ignore his testimony and base their opinions on the assumption that he operated the heater at a reduced fuel flow by adjusting the propane tank valve. SER-870-72; RT-681-83; ER-856, 883. They theorized that because the large heater produces so much heat, users, including Haney, reduce its fuel flow by adjusting the propane tank valve or by other means, which upsets combustion, causing higher levels of CO to be generated. *Id.* Interestingly, however, Daniel's experts also tested the subject heater by reducing its fuel flow and likewise did not obtain lethal levels of CO. RT-573-74, 636-38; SER-867; 870-72.

manufacture." 9th Cir. Dkt 46-1 at 2. Consequently, this Court must not give credence to Daniel's attempt to create a supposedly new, post-manufacture hazard. The certified question addresses only dangers already known at the time of manufacture.

#### B. The Coleman Powermate 5045 Propane Heater.

Coleman Powermate 5045 heaters are commercial/industrial heaters marketed to the construction industry and do-it-yourselfers.

RT-1208. They are big, powerful heaters rated at 30,000 Btu to 45,000 Btu of heat output. When running, they glow red hot and produce a loud hissing noise. RT-1142-43.

The Powermate 5045 is a high pressure, tank-top heater that operates off of 20-pound or larger propane tanks and is intended for outdoor or well-ventilated construction use only. RT-1222, 1485; SER-702; 710; 769-70. Consequently, it was designed to operate outdoors in the elements and to withstand the abuse of a construction environment. RT-1240-41.

The Model 5045 heater is equipped with a control knob that allows users to adjust the heat output within designed settings. SER-694. The control knob has a safety feature that causes the heater to automatically turn off if users attempt to set it anywhere below the intended lowest setting. SER-694; Tr. 907; 1248. Specifically, the control knob has

periodic "catches"—known as detents—that hold the knob at preset locations. *Id*. Once the control knob passes the lowest detent, the heater will shut off. *Id*.

The heater was certified by the International Approval Services in accordance with the standards set forth in CAN 1-2.23-M82. RT-1245-46. To obtain the certification, the heater passed certain emissions,<sup>3</sup> combustion, thermocouple, tip-over and temperature testing. RT-1248, 1250, 1252-54.

Coleman designed the Model 5045 heater in approximately 1994. RT-1075. The subject heater was manufactured in August 1995 and sold in 1996. RT-1138, 1225-26. Haney received the heater, used, from a friend while the two were stationed in Korea. RT-101-02.

Coleman knew, *prior* to manufacturing the heater, that propane-fueled appliances operate via combustion, which generates CO as a by-product. RT-957-59. Coleman also knew that if its heaters are operated in enclosures, the amount of CO generated can, under certain circumstances, reach injurious or lethal levels.<sup>4</sup> ER-40. In addition, Coleman was aware,

<sup>&</sup>lt;sup>3</sup> Daniel's assertion that reduced fuel operation of the heater is a new danger is contradicted by the fact that the emissions testing mandated by the standard includes, *inter alia*, operation of the heater in a reduced fuel mode. RT-401; 1248-52.

<sup>&</sup>lt;sup>4</sup> All fuel-burning appliances produce CO; the amount of CO generated depends on many factors, including the available oxygen in the operating environment and the air/fuel mixture for combustion. RT-1160; 1506. When oxygen is depleted or when the air/fuel mixture is upset resulting in incomplete combustion, higher levels of CO can be

both before and after the heater was manufactured, that some consumers had used its various models of propane radiant heaters in enclosures and some had been injured or died even though Coleman had specifically warned against such use. *Id.* 

#### C. Case History.

Mari Daniel sued Coleman claiming that defects in the heater caused the two men's deaths. ER-1342. Specifically, she claimed Coleman failed to provide adequate warnings at the time of manufacture. ER-1348; 1351 She also claimed that Coleman's knowledge of other CO incidents involving its heaters created a post-manufacture duty to warn of risks associated with use of the Powermate 5045, a duty which Daniel contended Coleman breached. ER-1345-46; 1348; 1351. Daniel also claimed the heater was defectively designed because it was more dangerous than a reasonable consumer would expect and because it did not contain certain design features that would have made it safer. ER-1345-48; 1350-51.

The case was tried to a jury of nine. At the close of Daniel's evidence, Coleman moved for judgment as a matter of law on each of Daniel's claims. ER-65. The District Court granted the motion with respect to Daniel's post-manufacture duty to warn claim but denied the

generated. RT-336-37; 339; 393. If used in the manner consistent with the warnings on the product, CO is not an issue, however. RT-1233-34.

motion on each of her other claims. *Daniel v. Coleman Co., Inc.*, 599 F.3d 1045, 1047 (9th Cir. 2010). After eleven trial days and a day and a half of deliberations, the jury unanimously found that the heater was reasonably safe both in its design and its time-of-manufacture warnings. *Id.; see also* ER 31.

Daniel moved for a new trial on the grounds that the trial court erred in dismissing her post-manufacture duty to warn claim, and she further argued that various evidentiary rulings of the trial court were erroneous and prejudicial. *Daniel*, 599 F.3d at 1047. The District Court denied Daniel's motion for new trial, and Daniel appealed to the Ninth Circuit. *Id.* In a 2-1 decision, the Ninth Circuit affirmed the District Court's rulings. *Id.* at 1049. Specifically, on the post-manufacture duty to warn claim, the Ninth Circuit held:

Here, Daniel does not present evidence of a new and distinct danger which arose after the point of sale. The danger of carbon monoxide poisoning was known to Coleman before the sale, and the heater was sold with warnings that, if followed, would prevent carbon monoxide poisoning. The jury found that the point-of-sale warnings on the Powermate 5045 adequately covered the risk of using the heater inside a camper and at a reduced fuel flow. Daniel does not contest this finding on appeal. The district court properly held that there was no post-sale duty to warn of a danger already accounted for.

Id. at 1048 (emphasis added).

Daniel thereafter filed a Petition for Rehearing and Motion to Certify solely on the post-manufacture duty to warn claim. 9th Cir.

Dkt 39. Despite having already issued its opinion, in a 2-1 decision, the Ninth Circuit granted Daniel's Motion to Certify, and certified the following question to this Court:

Whether, under Wash. Rev. Code § 7.72.030(1)(c), where a manufacturer has warned at the time of manufacture of a danger posed by a product, the manufacturer may have an additional duty to warn after the time of manufacture if the same danger already warned of is greater than was known at the time of manufacture and the initial warnings have not eliminated the danger.

9th Cir. Dkt 46-1 at 2.5

Rather than tailoring her certified question brief to the limited question posed by the Ninth Circuit, Daniel oddly seems to reargue evidentiary rulings on other incidents that have now been twice decided against her.<sup>6</sup> The Ninth Circuit affirmed each "other incident" ruling, and

<sup>&</sup>lt;sup>5</sup> Circuit Judge Bea dissented from the other two judges on the panel, finding that there is no question to be certified to this Court. (9th Cir. Dkt 46-2 at 1). Rather, according to Judge Bea the Ninth Circuit panel simply affirmed "that Daniel failed to provide legally sufficient evidence for a reasonable jury to conclude that Coleman learned of any new or greater danger posed by the Powermate 5045 after its manufacture, but before the unfortunate accident that claimed the lives of plaintiff-appellants' decedents." *Id.* In other words, there was no need for the Ninth Circuit to analyze the scope of a manufacturer's post-manufacture duty to warn under Washington law.

<sup>&</sup>lt;sup>6</sup> For instance, Daniel's two attachments were excluded by the District Court and, therefore, not properly referenced here. Suffice it to say, however, that Daniel was not denied an opportunity to present other incidents to the jury by various means. See RT-322-23 (Judge Strombom stating, "I am not sanitizing the record that Coleman had no knowledge about users taking the Focus 15 and 30, or others, in tents, and there was

Daniel did not raise those issues in her motion for certification. 9th Cir. Dkt 39. Consequently, those issues are not properly before this Court.

#### III. ARGUMENT

A. The WPLA's Plain Language, Structure and Legislative History Establish that There Is No Additional, Post-Manufacture Duty to Warn of the Same Danger Already Known and Warned Against at the Time of Manufacture.

The WPLA's plain language, structure, and legislative history dictate that the answer to the certified question must be "no." The WPLA draws a clear line between a time-of-manufacture warnings claim under RCW 7.72.030(1)(b) and a post-manufacture warnings claim under RCW 7.72.030(1)(c). The two claims are mutually exclusive and are meant to address and remedy distinct and different alleged dangers that arise at distinct and different times. Section 1(b) "concerns dangers that exist at the time of manufacture," *Ayers v. Johnson & Johnson Baby Prods., Co.*, 117 Wn.2d 747, 765 (1992), "about which the manufacturer knows 'at the time of manufacture." *Timberline Air Service, Inc. v. Bell Helicopter*-

injury or death resulting from that...."). For example, Coleman stipulated that it knew about other incidents in which consumers had died after allegedly using its heaters in enclosures and Daniel's counsel read that stipulation to the jury over and over. See, e.g., RT-45, 1165, 1188, 1850. Additionally, one of Coleman's engineers was questioned repeatedly about other incidents. RT-1188-92; 1195-97. These limited examples only scratch the surface. In the words of the District Court, there was "a lot of testimony about knowledge of other people dying or being injured from other heaters." RT-1192. The District Court correctly excluded many of Daniel's other incident exhibits, however, because they were not in admissible form. SER-556-57; 563 (Judge Strombom stating, "I have never, in the whole time I've been on the bench, seen anybody propose exhibits to the Court that contained documents that were obviously not admissible, and it was frustrating since I spent all weekend doing it. It bothers me to see that counsel present that to the Court suggesting that any of those documents are admissible.").

Textron, Inc., 125 Wn.2d 305, 320 (1994) (quoting Section 1(b)).

Section 1(c), by contrast, "sets forth the postmanufacture duty to warn," which "refers to a failure to warn of a danger of which the manufacturer learns after manufacture[.]" Id.; see also Ayers, 117 Wn.2d at 765 (Section 1(b) "concerns dangers that exist at the time of manufacture, rather than post-manufacture dangers") (emphasis added).

More specifically, Section 1(b) addresses dangers that exist or are known at the time of manufacture:

A product is not reasonably safe because adequate warnings or instructions were not provided with the product, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.

RCW 7.72.030(1)(b). Section 1(c), on the other hand, applies only to dangers learned of for the very first time after manufacture. It provides:

A product is not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured where a manufacturer learned or where a reasonably prudent manufacturer should have learned about a danger connected with the product after it was manufactured. In such a case, the manufacturer is under a duty to act with regard to issuing warnings or instructions concerning the danger in the manner that a reasonably prudent manufacturer would act in

the same or similar circumstances. This duty is satisfied if the manufacturer exercises reasonable care to inform product users.

RCW 7.72.030(1)(c). Under the plain language of Section 1(c), a post-manufacture duty to warn is triggered only if the manufacturer learns of a "danger" connected with the product "after" it was manufactured. *Id*.

This straightforward language, standing alone, requires that the Court answer "no" to the certified question. The certified question is expressly based on the fact that the manufacturer has already "warned at the time of manufacture" of the relevant "danger posed by the product." Thus, the question presupposes that the manufacturer learned of the danger *before* manufacture—thus enabling the manufacturer to include a time-of-sale warning with the product—not "after" manufacture, as required by Section (1)(c). The facts embedded in the certified question, therefore, give rise only to a time-of-manufacture warnings claim under Section 1(b). A post-manufacture duty to warn is not triggered as a matter of law.

Daniel would have this Court ignore the plain language of the statute and create an open-ended, continuing duty to update adequate time-of-manufacture warnings, as found by the jury, based on the existence of post-manufacture incidents already within the scope of the existing warning. This interpretation has no support in the statute's language or

history and is inconsistent with every reported Washington appellate decision that has discussed Section 1(c). Daniel's position—which would create a third, extra-statutory species of warnings claim—also is the same type of open ended product liability obligation that this Court has already rejected.

In attempting to find support in the statutory language, Daniel ignores the clear, temporal distinction between Section 1(b) and Section 1(c). Section 1(b) addresses dangers that exist "at the time of manufacture," while Section 1(c) is triggered only by a product danger learned "after it was manufactured." Daniel's position would completely eliminate this important distinction. See J.D. Lee & Barry Lindahl, Manufacturer's duties—Post-sale duties, 3 Mod. Tort L.: Liability and Litig. § 27:10 (2d. ed. 2010) ("Courts apply the traditional failure to warn claim when a manufacturer or seller had knowledge of a defect at the time of sale and apply the post-sale failure to warn claim when a manufacturer or seller learns of the defect after the time of sale."). It is well-settled, however, that this Court "may not delete language from an unambiguous statute: Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." State v. Roggenkamp, 153 Wn. 2d 614, 624 (2005) (internal cites and quotes omitted).

Daniel also asserts that the word "danger" in Section 1(c)—in and of itself—imposes a duty to engage in a continuous, post-manufacture likelihood-times-severity analysis of the same dangers already known and already warned against at the time of manufacture. In doing so, Daniel compares the word "harm" in Section 1(b) with the word "danger" in 1(c), and asserts the definition of danger is broader than harm, and is similar to risk. Daniel Br. at 14. Contrary to Daniel's assertion, though, the word "danger" and the word "risk" have different meanings. Risk is defined as the "uncertainty of a result, happening or loss; the chance of injury, damage or loss; esp[ecially], the existence and extent of the possibility of harm." Black's Law Dictionary 1442 (9th ed. 2009) (emphasis added). "Danger," by contrast, is defined as "Peril; exposure to harm, loss, pain or other negative result[;] . . . A cause of peril; a menace." Id. at 450. The word "risk" thus connotes a calculation of the likelihood that a particular condition or category of potential harm will result in injury, while the word "danger" simply refers to the condition or category of harm itself.

Section 1(c)'s legislative history validates this analysis. The

Senate Select Committee on Tort and Product Liability Reform made clear
that a post-manufacture duty to warn arises only in "the unique situation"
where "the manufacturer learned or should have learned about a product's
dangerous *condition* after it was manufactured." Senate Journal, 47<sup>th</sup>

Legislature (1981) at 631 (emphasis added). This language confirms that what triggers a post-manufacture duty to warn is learning about a dangerous condition after manufacture, not learning after manufacture that an already known danger is more likely to occur than originally anticipated. This latter situation—which involves a danger already in existence at the time of manufacture—is meant to be addressed by Section 1(b) only. Had the Legislature intended to create a continuing post-manufacture duty to update or revise existing warnings based on post-manufacture incidents involving the same danger, surely there would be some mention in the legislative history. There is not.

The overall structure of RCW 7.72.030 also shows that Daniel reads too much into the word "danger" in Section 1(c). See Daniel Br. at 13-15. Daniel's comparison between "harm" in Section 1(b) and "danger" in 1(c) is the incorrect comparison. Rather, when the Washington legislature wanted to mandate a risk balancing test it used the "likelihood" and "seriousness" language found in Sections 1(a) and 1(b). Both of those Sections expressly require a comparison between the "the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms" and the ability of the manufacturer to provide an alternative design or warning. See RCW 7.72.030(1)(a) and (b). This shows that when the Legislature wanted to mandate a risk-based balancing

test, it did so explicitly and with identical language across different sections.

Section 1(c) does not use this same "likelihood" and "seriousness" language, however. Instead, Section 1(c) enacts a negligence-based reasonably prudent manufacturer standard for post-manufacture warnings. Importantly, however, the obligation to issue post-manufacture warnings "in the manner that a reasonably product manufacturer would act" only arises "[i]n such a case"—referring to the singular situation described in the prior sentence, namely when a manufacturer learned or should have learned "about a danger connected with the product after it was manufactured." There is no mention of applying a post-manufacture reasonably prudent manufacturer standard or a likelihood/seriousness balancing test to dangers already known and warned against at the time of manufacture. This difference in language between Sections 1(a) and (b) on the one hand, and Section 1(c) on the other can only be viewed as intentional, and meant to enforce the sharp distinction between the two types of WPLA warnings claims. See Falk v. Keen Corp., 113 Wn.2d 645, 653 (1989) and Ayers, 117 Wn.2d at 765 (both finding significant the

<sup>&</sup>lt;sup>7</sup> Daniel asserts that Section 1(c) establishes a strict liability post-manufacture warnings claims. Daniel Br. at 12. This is an obvious misreading of *Ayers*, in which this Court explained at great length how and why Section 1(b)—the time-of-manufacture warnings section—is based on strict liability with no foreseeability requirement, 117 Wn.2d at 760-65, while the post-manufacture Section 1(c) "clearly embraces a negligence standard." *Id.* at 765.

dissimilarities in the language of Sections 1(a) and (b) and Section 1(c)).

Section 1(c) would require a dramatic re-write to impose the type of continuous post-manufacture duty that Daniel urges. Had the Legislature intended to create post-manufacture duty to warn based on "qualitative/quantitative changes in the nature of the original risk," Daniel Br. at 15, it would have written Section 1(c) as follows:

A product is not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured where a manufacturer learned or where a reasonably prudent manufacturer should have learned about a danger connected with the product after it was manufactured, or where a reasonably prudent manufacturer learned or should have learned after manufacture that the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms was greater than was known at the time of manufacture. In such a cases, the manufacturer is under a duty to act with regard to issuing new or revised warnings or instructions concerning the danger in the manner that a reasonably prudent manufacturer would act in the same or similar circumstances. This duty is satisfied if the manufacturer exercises reasonable care to inform product users.

Had the Legislature intended such an expansive post-manufacture duty to warn, surely it would have signaled its intent much more overtly than quietly slipping in the word "danger" in Section 1(c) rather than "harm" as it did in Section 1(b), while making no mention of this additional duty in the legislative history. What Daniel is really asking this Court to do is

substitute judicial judgment for legislative judgment in an area firmly committed to the Washington Legislature. It is axiomatic, however, that courts may not do so. As this Court has recognized on numerous occasions, "it is imperative that we not rewrite statutes to express what we think the law should be. We simply have no such authority." *State v. Groom*, 133 Wn. 2d 679, 689 (1997).<sup>8</sup>

In sum, Daniel's observation that nothing in RCW 7.72.030(1)(c) "indicates that the manufacturer is exonerated" from a continuing postsale duty to update time-of-sale warnings is premised on the wrong question. The question is not whether the statute exonerates manufacturers from such a duty, but rather whether the statute affirmatively imposes such a duty. The language, structure and legislative history all show that Section 1(c) does no such thing. The answer to the certified question, therefore, must be "no."

<sup>&</sup>lt;sup>8</sup> See also Hale v. Wellpinit School Dist. No. 49, 165 Wn. 2d 494, 506 (2009) ("The legislature's role is to set policy and to draft and enact laws." "[T]he drafting of a statute is a legislative, not a judicial, function.") (cites and quotes omitted); State v. Delgado, 148 Wn. 2d 723, 730 (2003) ("We will not 'arrogate to ourselves the power to make legislative schemes more perfect, more comprehensive and more consistent.") (citation omitted); Assoc. Gen. Contractors of Washington v. King County, 124 Wn. 2d 855, 865 (1994) ("[C]ourts may not create legislation in the guise of interpreting it."); Sedlacek v. Hillis, 145 Wn. 2d 379, 390 (2001) ("[T]he Legislature is the fundamental source for the definition of this state's public policy and we must avoid stepping into the role of the Legislature by actively creating the public policy of Washington.").

B. Washington Appellate Decisions Confirm that the WPLA Does Not Impose an Additional, Post-Manufacture Duty to Warn of the Same Danger Already Known and Warned Against at the Time of Manufacture.

Cases from this Court and the Court of Appeals that analyze the WPLA's warnings provisions confirm the above analysis. Daniel's suggestion that this Court has never had occasion to consider a manufacturer's post-sale duty to warn under RCW 7.72.030(1)(c) is incorrect. In fact, on two occasions in landmark WPLA cases, this Court has confirmed that Section 1(b) and Section 1(c) claims are separate and distinct, and that if the danger existed or was known at the time of manufacture only a time-of-manufacture claim under 1(b) comes into play.

In *Ayers*, this Court held that the time-of-manufacture warnings claim in Section 1(b) "is based on a strict liability standard" and "that the test requires no showing of foreseeability[.]" 117 Wn.2d at 752; *see also id.* at 761-65. In reaching this conclusion, the Court compared Sections 1(b) and 1(c), and observed that they are separate and distinct in scope:

Finally, we note [Section 1(c)] clearly embraces a negligence standard, requiring that "where a reasonably prudent manufacturer should have learned about a danger connected with the product after it was manufactured", the manufacturer must provide a warning. Subsection (b), on the other hand, which concerns dangers that exist at the time of manufacture, rather than post-manufacture dangers, does not include language incorporating a negligence standard. We explained in Falk that the dissimilarities between the language of subsections

(a) and (c) supported our conclusion that negligence is not the standard for design defect claims. Just so, the fact that subsection (b) does not include language like that found in subsection (c) supports the conclusion that negligence is not the standard for failure to warn claims.

Id. at 765 (emphasis added). By using the phrase "rather than" to distinguish between "dangers that exist at the time of manufacture" and "post manufacture" dangers, the Court acknowledged the distinct difference between the scopes of the different claims, and implicitly recognized that there is no additional post-manufacture duty to warn about dangers that exist and are known already at the time of manufacture. The Court also recognized that the importance of the Legislature's use of language in Section 1(b) is different from the language in Section 1(c). Again, nothing in Section 1(c) requires a manufacturer to reassess the likelihood and seriousness of dangers known and already warned against at the time of manufacture.

The Court also recognized the distinct differences between time-of-manufacture and post-manufacture warnings claims in *Timberline*, 125 Wn.2d at 314, a case that involved the quintessential post-manufacture warnings scenario, namely a new type of danger that arose only after manufacture. Defendant Bell designed and manufactured a military helicopter in compliance with mandatory government design

specifications. *Id.* at 308. Seventeen years later, the helicopter was transferred to an Oregon corporation for civilian use and certified by the Federal Aviation Administration ("FAA") for logging operations. *Id.*Timberline thereafter purchased the helicopter, but it crashed a few years later as a result of the failure of the –9 input pinion gear located in an intermediate gearbox. *Id.* 

Only after manufacture did Bell learn that repetitive heavy lift operations adversely affected certain helicopter components, including the –9 gear. *Id.* at 309. Bell knew about at least four other gearbox failures that occurred after manufacture but before the Timberline accident. Bell notified the FAA but did not issue post-manufacture warnings to owners of the former military helicopters. *Id.* On summary judgment, Bell argued that the WPLA's statutory government contractor defense embodied in RCW 7.72.050(2) provided a complete defense to Timberline's design defect and post-manufacture failure to warn claims. The trial court granted Bell's motion, but this Court granted direct review and reversed.

The Court held that compliance with mandatory government contractor specifications relating to design was a defense to a design defect claim, but not to a post-manufacture failure-to-warn claim. The Court recognized that under RCW 7.72.030(1) "distinct claims may arise

depending upon the way in which the product is alleged to be dangerous."

Id. at 315. The Court also rejected Bell's argument that Timberline's warnings theory was actually a design defect theory in disguise. Id. at 319-20. In doing so, the Court recognized the well-defined difference in scope between time-of-manufacture and post-manufacture warnings claims:

Like RCW 7.72.050(2), which references design and warnings "at the time of manufacture," RCW 7.72.030(1)(a) and (b) refer to design defects "at the time of manufacture" and failure to warn of dangers about which the manufacturer knows "at the time of manufacture". RCW 7.72.030(1)(c), however, which sets forth the postmanufacture duty to warn, refers to a failure to warn of a danger of which the manufacturer learns *after* manufacture, the type of claim which Timberline makes here.

*Id.* at 320 (emphasis added). Because Bell had learned of a new type of danger *after* manufacture, *i.e.*, "that repetitive heavy lift operations could stress the -9 gear and cause it to fail," a post-manufacture duty to warn had been triggered. *Id.* at 330-31.

As in *Ayers*, the Court in *Timberline* recognized the distinctive scope and function between RCW 7.72.030(1)(b) and 1(c). Measured against these cases, the answer to the certified question must be "no." Both decisions recognize that dangers known at the time of manufacture must be addressed, if at all, by Section 1(b), while Section 1(c) comes into

play only when a manufacturer learns about a danger, for the first time, after manufacture. According to the very factual premise of the certified question "the way in which the product is alleged to be dangerous," *Timberline*, 125 Wn.2d at 315, is via the "same danger already warned of" at the time of manufacture. Such a claim may only be remedied through a Section 1(b) time of manufacture warnings claim.

After *Timberline*, two Washington Court of Appeals cases, *Esparza v. Skyreach Equip., Inc.*, 103 Wn. App. 916 (2000) (Division One) and *Thongchoom v. Graco Children's Prods., Inc.*, 117 Wn. App. 299 (2003) (Division Three) likewise considered a manufacturer's post-manufacture duty to warn under RCW 7.72.030(1)(c). Contrary to Daniel's assertion, *Esparza* supports Coleman's position here. In addition, and importantly, the Court of Appeals in *Thongchoom* confronted a fact-pattern that is strikingly similar to the facts in the certified question, and held that a post-manufacture duty to warn did not exist as a matter of law regarding dangers already known and warned against at the time of manufacture.

Like the facts in *Timberline*, the facts in *Esparza* set forth the prototypical post-sale warnings scenario. *Esparza* involved a product failure mode—circuit cards damaged by excessive current—that arose for the very first time only after manufacture. *See* 103 Wn. App. at 932-36.

Unlike the facts of the certified question, *Esparza* did not involve a danger known at the time of manufacture and already covered by existing warnings. *Esparza*'s reference to other similar incidents, therefore, was in the context of incidents that provided new knowledge about a "specific danger" unknown at the time of manufacture. *Id.* at 935. As a result, *Esparza*'s discussion of other, post-manufacture incidents does not support Daniel's position, as those incidents involved a danger unknown at the time of manufacture, unlike the present case.

By contrast, Division Three's decision in *Thongchoom* involves facts directly relevant to the certified question and squarely supports a negative answer to the certified question. There, an eight-month old baby was burned when he moved his baby walker backwards and grabbed the cord to an electric teapot. The teapot fell on him, and he suffered burns. 117 Wn. App. at 302-03. The Thongchooms sued Graco, the walker manufacturer. The superior court granted summary judgment for Graco on the Thongchoom's design, time-of-manufacture, and post-manufacture warnings claims, and the Court of Appeals affirmed.

A label on the walker contained a variety of warnings regarding its inherent dangers. Much like Daniel did at trial here, the Thongchooms argued that the warnings were not precise and detailed enough. They attempted to define the nature of the incident with a high level of

specificity in order to create a supposedly new danger to justify a post-manufacture warnings claim. *Id.* at 306. The Court of Appeals rejected this argument, however, and affirmed summary judgment dismissal of the time-of-manufacture and the post-manufacture warnings claim:

The Thongchooms claim the warnings were inadequate because they failed to warn of every possible injury. Specifically, they contend the warnings should have stated that babies can move quickly in the walker and that they often move backward first. But Graco warned of risks associated with mobility. There is no further requirement to warn as claimed by the Thongchooms.

They further contend Graco had a duty to issue post-sale warnings. A post-sale duty to warn arises after a manufacturer has sufficient notice about a specific danger associated with the product. Their contention presupposes that the original warnings given by Graco were insufficient. They were not. Moreover, there is no evidence that Graco learned of any new danger after the walker was manufactured. The incident with Tyler was covered by the warnings given by Graco at the time of manufacture. Graco had no duty to issue a post-sale warning.

Id. at 306-07 (emphasis added) (citation omitted).

The reasoning in *Thongchoom* is directly applicable to the certified question, and is particularly compelling given the jury's verdict in the present case that Coleman's time-of-manufacture warnings are reasonably safe. Consistent with the language and history of Sections 1(b) and 1(c), and in keeping with this Court's own cases, *Thongchoom* teaches that

there is no post-manufacture duty to warn of a danger known at the time of manufacture and covered by the existing warnings.

In sum, a survey of the Washington appellate cases addressing the post-manufacture duty to warn confirms what is evident from the language and history of the WPLA. A Section 1(c) post-manufacture warnings claim was never intended to invade the province of Section 1(b). These cases all mandate a negative answer to the certified question.

## C. Creation of An Additional Post-Manufacture Duty to Warn Is Not Necessary to Protect Washington Consumers.

The fact that the Washington Legislature did not create a post-manufacture duty to warn of dangers already warned of is not surprising. The WPLA's time-of-manufacture warnings claim under RCW 7.72.030(1)(b) squarely and fully covers the hypothetical situation posed by the certified question. Section 1(b) is broad and robust enough to give claimants in this situation a full and fair opportunity to seek a remedy. Thus, answering "no" to the certified question will not leave a class of product users without a remedy.

More specifically, Section 1(b) "is based on a strict liability standard" that "requires no showing of foreseeability" to satisfy. *Ayers*, 117 Wn.2d at 752; *id.* at 760-65. The likelihood and seriousness balancing test in Section 1(b) also is broad, and permits consideration of post-manufacture incidents: "The likelihood, or probability, that an event

would occur, on the other hand, does not depend on what a reasonable person would have anticipated under the circumstances, but on an assessment of all relevant facts, including those available only in hindsight." Ayers, 117 Wn.2d at 764 (emphasis added). In addition to the balancing test set forth in Section 1(b), a claimant may prove inadequate time-of-manufacture warnings by showing that "the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer." RCW 7.72.030(3). In applying this consumer expectations test to a time-of-sale warnings claim, a jury is entitled to consider (and the Daniel jury considered here) "the relative cost of the product, the seriousness of the potential harm from the claimed defect, the cost and feasibility of eliminating or minimizing the risk and such other factors as the nature of the product and the claimed defect indicate are appropriate." WPI 110.03; ER-48 (District Court's time-of-manufacture warnings instruction to the Daniel jury). In addition, a claimant need not establish the exact wording of an alternative warning, but rather satisfies the statute merely by specifying "the substance of the warning." Ayers, 117 Wn.2d at 756.

Placed in the context of the certified question, Section 1(b) thus permits a claimant to use post-manufacture incidents to argue that existing warnings are inadequate. Post-manufacture incidents provide the benefit

of "hindsight" permitted by the strict liability standard, *Ayers*, 117 Wn.2d at 764, and may show that initial warnings are inadequate because "the same danger already warned of is greater than was known at the time of manufacture and the initial warnings have not eliminated the danger." This was precisely Daniel's strategy at trial. Though the District Court excluded some other incident evidence, it admitted a great deal of such evidence, including evidence of post-manufacture incidents involving the same product, the Model 5045. After a full and fair trial, a jury of nine measured the facts of this case and the other incident evidence against the existing, time-of-manufacture warnings, and unanimously found those warnings reasonably safe. Daniel was thus afforded her day in court on the warnings issue. This Court need not and should not create a purported additional post-manufacture duty to warn that completely overlaps with the existing, time-of-manufacture warnings remedy under the WPLA.

#### D. An Additional Post-Manufacture Duty to Warn of the Same Danger Already Warned of Would Create an Unpredictable Form of Near Absolute Liability.

Not only is an additional, expanded post-manufacture duty to revise time-of-manufacture warnings unnecessary, such a duty would create an unpredictable form of near absolute liability and would lead to absurd results. In *Baughn v. Honda Motor Co., Ltd.*, 107 Wn.2d 127 (1986), this Court refused to adopt an alternative, expanded test for design

defect, instead adhering to its decision in *Seattle-First Nat'l Bank v*.

Tabert, 86 Wn.2d 145 (1975)—the case that, in essence, was codified by the WPLA. *See Falk*, 113 Wn.2d at 651-53. *Baughn*'s lessons are instructive here.

Baughn arose from a Honda mini-trail bike accident that seriously injured two young boys who were just shy of their ninth birthdays. The warning decals on the mini-bike prominently warned that the bike was for off road use only and that it was not to be operated on public streets or roads. The decal also added "Always Wear a Helmet." Baughn, 107

Wn.2d at 129-31. Despite these warnings, and similar warnings from their parents, the boys rode the mini-bike on a public street, ran three stops signs, and collided with a truck. One boy was not wearing a helmet; the other wore an unfastened helmet that flew off on impact. Id at 130-31. The trial court granted summary judgment for Honda, and this Court affirmed on direct review.

Baughn urged this Court on appeal to adopt a strict liability design defect rule "that eliminates consideration of consumer expectations and balances only the risk and the utility of using a given product"—a so-called "pure form of risk utility analysis." Id. at 134-35. The Court rejected this request. At the outset, the Court reaffirmed that "[w]here there are no design or manufacturing defects in the product, and where the

warnings concerning its use are adequate, a manufacturer is not liable for an accident and resulting injuries." Id. at 132. The Court discussed with approval the reasoning of courts and commentators that had rejected such an expansive design defect test. Those authorities observed that "the test is so expansive that, as a practical matter, sellers will face potential and unpredictable liability for almost any injury related to product use" and the jury would be, "in effect, allowed to legislate in each particular case whether the manufacturer of a well made product should insure its use." Id. at 135-36 (internal cites and quotes omitted). This Court agreed, reiterating Tabert's teaching that "[t]he doctrine of strict liability does not impose legal responsibility simply because a product causes harm. Such a result would embody absolute liability which is not the import of strict liability." Id. at 136 (quoting Tabert, 86 Wn.2d at 150. As a result, the Court "decline[d] to adopt the open-ended type of risk-utility analysis advocated by" Baughn. Id.

The *Baughn* Court also refused to adopt an additional, special failure to warn test for products used by children, and rejected Baughn's argument that Honda's warnings were wanting because they did not describe what might happen if a child did ride the bike in the street. *Id.* at 136-42. The Court reaffirmed that warnings need not be given for obvious or known dangers. *Id.* at 139.

The Court also cited with approval the Court of Appeals' decision in Novak v. Piggly Wiggly Puget Sound Co., 22 Wn. App. at 407 (1979), which involved an eleven year old who was struck in the eye by a ricocheting BB while watching his friend shoot a BB gun. The Court of Appeals found the warnings adequate as a matter of law: "The [Novak] court pointed to several statements regarding the danger of ricochet in the gun's operator's manual, and observed that they were related to the precise danger encountered but were simply disregarded by the user." Baughn, 107 Wn.2d at 140 (citing *Novak*, 22 Wn. App. at 413-14). Applying this reasoning, the Baughn Court ruled that although Honda "did not warn against every conceivable danger that could be encountered if children rode its mini-trail bikes on public streets and roadways" Honda did "specifically instruct that they were intended for off-road use only and that riders should wear helmets." Id. at 141. The Court also emphasized that the parents had judged their children ready to ride, and also had warned the children not to ride on the street. *Id.* Under these circumstances, "Honda satisfied its duty to warn under the law of negligence and strict liability." Id. at 142.

Although *Baughn* is a pre-WPLA case, its logic holds true today and applies with equal or even greater force here. Just as the so-called "pure" risk/utility design defect test would have created a near absolute,

"unpredictable liability standard for almost any injury related to product use," Baughn, 107 Wn.2d at 135, so, too, would an additional postmanufacture duty to warn test, which would allow nearly unfettered second-guessing of indisputably adequate time-of-sale warnings. For example, if there had been another post-manufacture incident involving a child riding a Honda mini-bike on the street without a helmet, Honda would have been forced to face a jury trial under the expanded postmanufacture duty to warn theory. If the certified question is answered "yes," a claimant could argue that Honda knew.or should have known that the "same danger already warned of"—i.e., riding on the street without a helmet—"was greater than was known at the time of manufacture and the initial warnings have not eliminated the danger." 9th Cir. Dkt 46-1 at 2. Similarly, had there been another post-manufacture incident involving a ricocheting BB, the manufacturer in the *Novak* case would not be entitled to summary judgment, because the claimant could argue that the "danger" of ricochet incidents was greater than known at the time of manufacture and that it was obvious that the original warning did not eliminate the danger. These results are quite certainly absurd—a situation this Court takes pains to avoid. Timberline, 125 Wn.2d at 317 ("Another principle of statutory construction is that a statute should be construed so as to avoid unlikely, absurd, or strained consequences."). Yet, under the position

urged by Daniel, every product with even unquestionably thorough and comprehensive time-of-manufacture warnings will be subject to a post-manufacture warnings claim based merely on the existence of post-manufacture incidents where users ignored those warnings. This is precisely the type of unprincipled and open-ended standard that this Court rejected in *Baughn*.

Lest Daniel argue that mini-bikes and BB guns are an entirely different class of product than the Model 5045 heater, it is important to keep in mind that after a two-week trial, the Daniel jury unanimously found that the subject heater was reasonably safe in design and in its timeof-manufacture warnings. While this fact is not necessary to answer "no" to the certified question, the Court need not ignore the jury's verdict, either. This heater's design and on-product warning, having been exonerated by a jury, thus is before this Court in an even stronger posture than the products in *Baughn* and *Novak*, which were deemed safe by courts. Accordingly, it is fully appropriate to recognize in the context of mini-bikes, BB guns and Coleman propane heaters that there are many reasons that post-manufacture incidents may occur besides the possibility that the adequate time-of-manufacture warnings are not working. Warnings can be "simply disregarded by the user," Baughn, 107 Wn.2d at 139, as they were in *Baughn* and *Novak*, and like they were in the present

case. Here, Haney knew, before the accident, that the subject heater produces CO, and he knew the product had a warning but chose not to read it. RT-135; 141-42.

Accordingly, the Court must answer "no" to the certified question to avoid creating a near absolute liability warnings standard and an unpredictable cascade of absurd results.

## E. No Other Jurisdictions Recognize a Post-Manufacture Duty to Provide Additional Warnings for a Danger Known and Warned About at the Time of Manufacture.

The expanded post-manufacture duty to warn that Daniel seeks not only is contrary to Washington law, but it is out of step with the rest of the nation. Indeed, Daniel fails to cite a single authority that recognizes such an expansive duty. Rather, Daniel makes a passing reference to two "traditional" post-manufacture duty to warn cases, urges this Court to follow the Restatement (Third) of Torts § 10, and asks this Court to buy stock in an Illinois Court of Appeals case, *Jablonski v. Ford Motor Co.*, 923 N.E.2d 347 (Ill. Ct. App. 2010). None of these authorities support Daniel's position, however.

First, Daniel cites *Comstock v. General Motors Corp.*, 99 N.W.2d 627 (Mich. 1959) and *Cover v. Cohen*, 461 N.E.2d 864 (N.Y. 1964) for the proposition that "RCW 7.70.303(1)(c) is consistent with traditional case law on post-manufacture duty to warn." Daniel Br. at 11. Coleman

agrees. Both *Comstock* and *Cover* involved hazards in automobiles that were only discovered *after* manufacture. *Comstock*, 99 N.W.2d at 630 (failure of power brakes); *Cover*, 461 N.E.2d at 866 (sudden acceleration issue). Furthermore, in each of those cases, the manufacturers notified their dealers of the hazards but did not notify vehicle owners of the hazard. *Comstock*, 99 N.W.2d at 631; *Cover*, 461 N.E.2d at 867. Both courts determined that a post-manufacture duty to warn had been triggered. *Comstock*, 99 N.W.2d at 634; *Cover*, 461 N.E.2d at 871. Specifically, the *Comstock* court found:

If such duty to warn of a known danger exists at [the] point of sale, we believe a like duty to give prompt warning exists when *a latent defect* which makes the product hazardous to life becomes known to the manufacturer shortly *after* the product has been put on the market.

99 N.W.2d at 634 (emphasis added); see also Cover, 461 N.E.2d at 871 ("Although a product be reasonably safe when manufactured and sold and involve no then known risks of which warning need be given, risks thereafter revealed by user operation and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn.") (emphasis added).

As with Section (1)(c), the *Comstock* and *Cover* courts found that the post-manufacture duty to warn is triggered only when the

manufacturer learns of a latent defect *after* the product has been put on the market. Consequently, neither *Comstock* nor *Cover* support Daniel's argument for the expansion of RCW 7.72.030(1)(c).

Furthermore, Coleman is unaware of any state that has adopted an additional, post-manufacture duty to warn of dangers known and already warned about at the time of manufacture. Not all states even recognize a post-manufacture duty to warn, but those that do, are all consistent with Washington law, namely that the manufacturer's post-manufacture duty to warn is triggered only when it discovers or should have discovered a hazard after manufacture. See Nationwide Summary of Post-Manufacture Duty to Warn Laws) (Attachment 1 hereto); see also Douglas R. Richmond, Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit and Recall, 36 Idaho L. Rev. 7, 18 (1999) ("Warnings that were or should have been given when a product was sold are referred to as 'point of sale' warnings. 'Post-sale' warnings refer to warnings allegedly required where a manufacturer does not know or have reason to know of a hazard at the time a product is sold, but discovers the hazard sometime later."); Joseph J. Ortego, Post-Sale Duties to Warn, To Recall, and to Retrofit, 33 A.L.I. 265 (1998) ("The majority view is that imposition of a post-sale duty to warn should focus on the conduct of the manufacturer after it has released a product into the market and then

learns about defects that it didn't know about, and couldn't reasonably have known about, at the original sale."); J.D. Lee & Barry Lindahl, Elements of strict liability—"Defective" product—Defective warning—Post-sale duty to warn, 3 Mod. Tort L. § 27:39 (2d ed. 2010) ("A number of jurisdictions have expanded the duty to warn to include warnings after the sale when the product later reveals a defect not known at the time of sale, either by statute or judicial decision.[] Most of those courts agree that a post-sale failure to warn claim arises when the manufacturer or seller becomes aware that a product is defective or unreasonably dangerous after the point of sale and fails to take reasonable steps to warn consumers who purchased the product.") (emphasis added).

Second, the Restatement (Third) of Torts § 10 likewise lends no support to Daniel's position. As Daniel aptly points out, the comments to Section 10 indicate that, like RCW 7.72.030(1)(c), the Restatement requires post-sale warnings only where information is "brought to the attention of the seller, *after* the time of sale, concerning risks accompanying the product's use or consumption.... "[W]hen reasonable grounds exist for the seller to suspect that *a hitherto unknown risk exists*, especially when the risk involved is great, the duty of reasonable care may require investigation." Restatement (Third) of Torts § 10, cmt. c (emphasis added). The certified question does not involve hitherto

unknown risks. Thus, as with RCW 7.72.030(1)(c), the Restatement (Third) of Torts § 10 imposes a post-manufacture duty to warn of risks brought to the manufacturer's attention *after* the time of sale. Therefore, even if this Court were to adopt Section 10 of the Third Restatement, a duty to warn would not have been triggered under the facts of this case.

Finally, Daniel cites *Jablonski v. Ford Motor Co.*, 923 N.E.2d 347 (III. Ct. App. 2010), for the proposition that Coleman had a continuing duty to warn regarding dangers it was aware of at the time of manufacture, a concept that is not recognized by RCW 7.72.030(1)(c). Daniel Br. at 24-25. The facts of *Jablonski*, which Daniel omits from her brief, are clearly distinguishable. In *Jablonski*, the plaintiffs suffered severe burn injuries as a result of a rear-end collision. 923 N.E.2d at 356. Plaintiffs alleged the vehicle was defectively designed and that Ford was aware of this defect *at the time of manufacture*. Specifically, Ford was aware that in some of its vehicles, fuel tanks were being punctured by trunk contents in rear-end collisions, resulting in serious and fatal burn injuries. *Id.* at 379.

Ford eventually developed an upgrade kit, consisting of shields to prevent fuel tank ruptures, and "Trunk Packing Considerations" were developed, which instructed police officers who drove Ford's vehicles on the best ways to pack their trunks to avoid fuel tank ruptures. *Id.* Ford also provided post-sale warnings to (1) all registered owners of police

vehicles; (2) all United States Ford, Lincoln and Mercury dealers; and (3) 32,000 government fleet customers. *Id.* It did not, however, issue post-sale warnings to civilian owners of the same vehicles, including the Jablonskis who experienced a fire caused by a pipe wrench propelling through the trunk wall and into their fuel tank. *Id.* at 359-61.

Like Ford, which was aware of the danger that its fuel tanks were rupturing in rear-end collisions, Coleman was aware of the danger of its heaters being used in enclosed spaces such as the camper here. Unlike Ford, however, Coleman specifically warned about the danger and how to avoid it at the time of manufacture. Ford issued no such warnings at the time of manufacture and only eventually warned a select few of its registered owners (police and government fleet customers) and dealers. It did not warn all owners of the danger. Coleman, on the other hand, placed its warning on every one of its heaters, and the jury found that the warnings were adequate. Thus, the facts of *Jablonski* are dissimilar to the facts of this case, and, therefore, are simply not relevant to the issue to be decided by this Court.

Moreover, this appeal involves specifically a manufacturer's duties under the Washington post-manufacture duty statute, which references dangers discovered *after* manufacture. RCW 7.72.030(1)(c). In *Jablonski*, a case involving Ford's knowledge of a hazard *at the time of* 

manufacture, the Illinois Court of Appeals specifically stated, "in order to decide the issues in this case, we do not need to determine whether Illinois should adopt a postsale duty to warn of hazards not discovered until after a product leaves the manufacturer's control. Therefore, we offer no opinion on that issue." Id. at 379. Consequently, Jablonski does not support Daniel's argument not only because its facts differ but also because that court was not considering the same issue as this Court.

Put simply, Daniel has had numerous opportunities to convince the District Court, the Ninth Circuit, and now this Court that Coleman had a post-manufacture duty to warn. She has failed to cite a single case or post-manufacture duty to warn statute that supports her argument that a post-manufacture duty to warn existed under the circumstances of this case. Consequently, there is no basis for this Court to answer the Ninth Circuit's certified question in the affirmative. The answer to the court's question is clearly, "no."

### F. Even if this Court Expands the Post-Manufacture Duty to Warn, Daniel Cannot Prevail in this Case.

Daniel cannot prevail in the case no matter how the Court answers the certified question. Even if the Court expands the post-manufacture duty to warn, there is only speculation and nothing more that (1) such a warning would have reached Haney or the decedents; and (2) such a warning would have prevented the accident because no one read the

warnings that were provided (even though Haney knew a warning was present), and Haney already was fully aware of the danger. So Daniel cannot prevail even if the Court holds in her favor.

Daniel offered no evidence at trial that Haney (who was not the purchaser of the heater) or the decedents (who did not own or operate the heater) would have even received a post-manufacture warning, much less read and heeded one. Judgment as a matter of law on a plaintiff's warnings claims may be entered when no reasonable person could conclude that the alleged failure-to-warn was the cause-in-fact of the plaintiff's injury. Hiner v. Bridgestone/Firestone, Inc., 138 Wn. 2d 248, 256-58 (1999); Soproni v. Polygon Apartment Partners, 137 Wn. 2d 319, 326 (1999); Anderson v. Weslo, Inc., 79 Wn. App. 829, 838 (1995). More specifically, dismissal is appropriate where the evidence establishes that the product user did not read the warnings that were provided and, therefore, would not have altered his or her behavior had the manufacturer provided different warnings. See, e.g., Hiner, 138 Wn. 2d at 256-58; Weslo, 79 Wn. App. at 839-40. Dismissal also is appropriate where the evidence established that the user already was aware of the alleged danger. See, e.g., Soproni, 137 Wn. 2d at 325-26; Weslo, 79 Wn. App. at 839.

In this case, Haney noticed the on-product warnings but did not read them. *Daniel*, 599 F.3d at 1047; see also RT 135, 141-42; SER-769.

Further, there was no evidence that either Ramiskey or Daniel ever read the warnings, and Daniel was unable to read. RT-135, 141-42, 155-56, 871. Because neither Haney nor the decedents read the warnings that were provided, it would be pure speculation to suggest that they would have received, read and acted upon a post-manufacture warning. *Hiner*, 138 Wn. 2d at 258.

In addition, Haney received military and EMT training on the dangers of CO poisoning prior to the accident. He also admitted that he knew when he brought the subject heater into the camper that the heater produces CO. RT 104, 149, 157. Thus, the lack of a post-manufacture warning "did not contribute to the accident in any way." *Soproni*, 137 Wn. 2d at 325-26. As a result, even if this Court were to expand the scope of a manufacturer's post-sale duty to warn set forth in RCW 7.72.030(1)(c) by answering the Ninth Circuit's certified question in the affirmative, the opinion would not impact the ultimate outcome of this case. Daniel cannot establish the necessary element of causation—the lack of warnings (time-of-manufacture or post-sale) simply did not cause this accident.

#### IV. CONCLUSION

For the above reasons, Defendant-Appellee The Coleman Company, Inc. respectfully requests that this Court answer "no" to the Ninth Circuit's certified question.

DATED: September 27, 2010

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# ATTACHMENT ONE Multistate Survey

## MULTI -STATE SURVEY OF POST-MANUFACTURE DUTY TO WARN

STATE	THE LAW
Arizona	Readenour v. Marion Power Shovel, 149 Ariz. 442, 448 (1986) (recognizing a post-sale duty to warn after the danger is recognized by the manufacturer).
Colorado	"The duty to warn exists where a danger concerning the product becomes known to the manufacturer subsequent to the sale and delivery of the product, even though it was not known at the time of the sale." Downing v. Overhead Door Corp., 707 P.2d 1027, 1033 (Col. App. 1985).
Georgia	"Georgia law recognizes a manufacturer's duty to warn consumers of danger arising from the use of a product based on <i>knowledge acquired after the product is sold.</i> " DeLoach v. Rovema Corp., 241 Ga. App. 802, 804 (1993).
Hawai'i	"In the context of negligence actions, we agree with the following analysis of the Colorado Court of Appeals:  The duty to warn exists where a danger concerning the product becomes known to the manufacturer subsequent to the sale and delivery of the product, even though it was not known at the time of the sale."  Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 355 (1997) (citing Downing v. Overhead Door Corp., 707 P.2d 1027, 1033 (Colo. Ct. App. 1985) (citations omitted)).
Idaho	Idaho Code § 6-1406(1): "The provisions of this section shall not relieve the product seller of any duty to warn of known defects discovered after the product was designed and manufactured."
Iowa	Iowa Code § 668.12: "2. Nothing contained in subsection 1 shall diminish the duty of an assembler, designer, supplier of specifications, distributor, manufacturer, or seller to warn concerning <i>subsequently acquired knowledge of a defect or dangerous condition</i> that would render the product unreasonably dangerous for its foreseeable use or diminish the liability for failure to so warn."

STATE	THE LAW
Kansas	"We reason that a manufacturer who was unaware of a hazard at the time of sale and has since acquired knowledge of a life-threatening hazard should not be absolved of all duty to take reasonable steps to warn the ultimate consumer who purchased the product; however, the warning of unforeseeable dangers is neither required nor possible at the time of sale. A manufacturer is to be given a reasonable period of time after discovery of the life-threatening hazard in which to issue any post-sale warning that might reasonably be required." Patton v. Hutchinson Will-Rich Mfg. Co., 253 Kan. 741, 761 (1993).
Louisiana	La. R.S. § 9:2800.57.C: "A manufacturer of a product who, after the product has left his control, acquires knowledge of a characteristic of the product that may cause damage and the danger of such characteristic, or who would have acquired such knowledge had he acted as a reasonably prudent manufacturer, is liable for damage caused by his subsequent failure to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product."
Maryland	"Generally, a manufacturer of a defective product has a duty to warn of product defects which the manufacturer discovers after the time of sale." Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 446 (1992).
Massachusetts	Lewis v. Ariens Co., 434 Mass. 643, 647-49 (2001) (adopting Section 10 of the Restatement (Third) of Torts: Products Liability (1998) and affirming "a continuing duty to warn (at least purchasers) of risks discovered following the sale of the product") (citation omitted).
Michigan	"If such duty to warn of a known danger exists at point of sale, we believe a like duty to give prompt warning exists when a latent defect which makes the product hazardous to life becomes known to the manufacturer shortly after the product has been put on the market." Comstock v. General Motors Corp., 358 Mich. 163, 177 (1959).

STATE	THE LAW
Minnesota	Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826, 833 (Minn. 1988) (finding a post-sale duty to warn where danger is discovered after time of manufacture and sale).
New Jersey	N.J.S.A. § 2A:58C-4: "In any product liability action the manufacturer or seller shall not be liable for harm caused by a failure to warn if the product contains an adequate warning or instruction or, in the case of dangers a manufacturer or seller discovers or reasonably should discover after the product leaves its control, if the manufacturer or seller provides an adequate warning or instruction."
New Mexico	Couch v. Astec Indus., Inc., 132 N.M. 631, 641-42 (2002) (validating a jury instruction that stated "[a] supplier who later learns, or in the exercise of ordinary care should know, of a risk of injury caused by a condition of the product or manner in which it could be used must then use ordinary care to avoid the risk."
New York	"Although a product be reasonably safe when manufactured and sold and involve no <i>then known risks</i> of which warning need be given, <i>risks thereafter revealed</i> by user operation and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn." <i>Cover v. Cohen</i> , 61 N.Y.2d 261, 275 (1984).
North Carolina	N.C. Gen. Stat. § 99B-5(a)(2): "(2) After the product left the control of the manufacturer or seller, the manufacturer or seller became aware of or in the exercise of ordinary care should have known that the product posed a substantial risk of harm to a reasonably foreseeable user or consumer and failed to take reasonable steps to give adequate warning or instruction or to take other reasonable action under the circumstances."
North Dakota	Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401, 409 (N.D. 1994) (finding a post-sale duty to warn where "[t]he defendants became aware of those dangers after the manufacture and sale of the product").
Ohio	Ohio Rev. Code Ann. § 2307.76(2)(a)-(b) (focusing on knowledge gained after the time the product left the manufacturer).

STATE	THE LAW
Washington	Wash. Rev. Code. § 7.72.030(1)(c) ("A product is not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured where a manufacturer learned or where a reasonably prudent manufacturer should have learned about a danger connected with the product after it was manufactured.).
Wisconsin	Sharp ex rel. Gordon v. Case Corp., 227 Wis. 2d 1, 23-25 (1999) (finding a post-sale duty to warn where the manufacturer learned of dangers after the sale of the product).



#### CERTIFICATE OF SERVICEEP 27 PH 3: 11

I, Julia D. Wood, certify that on September 27, 2010, I caused a true and R correct copy of the foregoing APPELLEE'S ANSWERING BRIEF ON THE CERTIFIED QUESTION to be served by U.S. Mail on the following counsel of record as follows:

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Dated this 27th day of September, 2010, at Seattle, Washington.

Julia D. Wood, Legal Secretary